ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 4(g) of the Cable Television Consumer Protection Act of 1992	)))	MM Docket No. 93-8

To the Commission:

REPLY COMMENTS OF SILVER KING COMMUNICATIONS, INC.

John R. Feore, Jr., Esq.
Suzanne M. Perry, Esq.
DOW, LOHNES & ALBERTSON
1255 - 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

TABLE OF CONTENTS

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SUMMARY OF ARGUMENT

The Comments filed in this proceeding overwhelmingly demonstrate that television stations with a home shopping entertainment format can and do operate in a manner which is fully consistent with the public interest, convenience and necessity. The evidentiary record herein indisputably requires a Commission finding that such stations are entitled to mandatory carriage rights under the 1992 Cable Act.

The Commission must make that finding promptly. A delay in a decision herein beyond the June 2, 1993, date for cable systems' commencement of carriage of their complement of must-carry signals would in practice deny home shopping stations the benefits of mandatory carriage to which their public service operation entitles them. A decision delayed would be justice denied. The Commission must act quickly to bring this proceeding to a conclusion.

The few opponents of mandatory carriage for home shopping stations -- virtually all of the comments supported must-carry status for such stations -- offer nothing beyond hysterical hyperbole to support their position. They submit neither facts nor legal analysis which in any way detract from the substantial factual showing of extensive public service programming which SKC and other licensees of home shopping stations have submitted for the record.

The suggestion that this proceeding provides an appropriate forum to revisit Television Deregulation has no basis in language of the 1992 Cable Act or in Commission procedures. Congress nowhere directed the Commission to

issue of public interest qualification for mandatory carriage rights is clearly of more limited, narrow scope than a broad-based inquiry into the judicially-approved policy decisions of a decade ago.

Opposing comments likewise cannot support their

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Silver King Communications, Inc. ["SKC"], by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

Introduction

SKC's initial Comments demonstrated that home shopping entertainment formats are compatible with broadcast television station operations which comply in all respects with the public interest: SKC's stations provide extensive schedules of issue-responsive, local public service programming, and thus adhere to established public interest requirements to a greater extent than most independent UHF stations utilizing traditional entertainment formats. Indeed, if the SKC stations carried the type of programming seen on most television stations -- violent dramas, sexually-explicit talk shows, game shows and situation comedies -- there would be no question that their public service programming and operational records comply with the

public interest. The constitution prohibits a different result based solely upon the content of stations' entertainment programming. Thus, the SKC stations are clearly entitled to must-carry status under Section 4(g) of the 1992 Cable Act.[1/]

Virtually all parties filing comments in this proceeding agree with that conclusion. Many of the comments were filed by licensees of other stations with home shopping entertainment formats and have provided additional record evidence that such stations can and do carry substantial public service programming.[2/] These filings should dispel any remaining misconception that home shopping stations do not air comparable public service programming, both qualitatively and quantitatively, as conventionally formatted stations.

The Comments also confirm the critical role played by Home Shopping Network, Inc. ["HSN"] and SKC in facilitating minority ownership and operation of television stations.[3/] Cable carriage is essential to these stations'

1/ Pub. L. No. 102-385, 106 Stat. 1460 (1992 ["1992 Cable Act"]; 47 U.S.D. § 534(g) ["Section 4(g)"].

2/ See, e.g., Comments of Pan Pacific Television, Inc.; Comments of Ponce Nicasio Broadcasting, Inc.; Comments of Channel 63, Inc.; Comments of Video Mall Communications, Inc.; Comments of Reading Broadcasting, Inc.

3/ See, e.g., Comments of Ponce Nicasio Broadcasting, Inc.; Comments of Pan Pacific Television, Inc.; Comments of the National Association of Black Owned Broadcasters, Inc.

continued success and denying them rights to such carriage would have a devastating adverse impact on minority ownership, a result directly contrary to almost 30 years of Congressional and Commission affirmative action policies.

As virtually all of the comments emphasize, the sole touchstone for operation in the public interest is a station's public service programming, not its entertainment programming.[4/] SKC and other home shopping stations seek no advantage over nor preferential treatment with respect to other stations: they ask only that their public interest performance be judged on the same basis as traditionally formatted stations -- using non-entertainment programming as the touchstone of public interest performance. The comments overwhelmingly establish that judged upon these established public service programming criteria, home shopping stations do serve the public interest and are entitled to the same must-carry rights as other broadcast television stations.

Only a few commenters dispute this conclusion. Comments filed by the National Cable Television Association, Inc. ["NCTA"] and the Center for the Study of Commercialism ["CSC"] ignore the SKC Stations' extensive record of public service programming and that record's dispositive decisional significance. Such Comments completely ignore the fact that

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4/ See, e.g., Comments of the Association of Independent Television Stations, Inc. ["INTV"]; Comments of the National Association of Broadcasters, Inc. ["NAB"].

home shopping stations can and do broadcast comparable public service programming to that of conventionally-formatted stations.[5/]

CSC's Comments would be more appropriately filed as a petition for rulemaking seeking reversal of the Commission's Television Deregulation decision[6/] because they are principally devoted to quarreling with the policy it reflects. In doing so, CSC asks the Commission to take the constitutionally impermissible step of regulating speech based solely on content, reflecting misconstruction of applicable constitutional principles as well as willful disregard of the public service programming aired by home shopping stations.[7/] CSC's hysterical criticism of the home shopping format should not be allowed to obscure the

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5/ In fact, as demonstrated in its Comments, SKC's approach to public interest programming represents a return to the roots of local issue-responsive public service.

6/ Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, MM Docket No. 83-670, 98 FCC 2d 1076 (1984) ["Television Deregulation"], recons. denied, Memorandum Opinion and Order, 104 FCC 2d 358 (1986) ["Television Deregulation Reconsideration"], aff'd in part and remanded in part sub. nom., Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987) ["ACT"].

7/ Comments filed by Mike Rozman and Janet Taylor likewise fail to acknowledge the extent of home shopping stations' public service programming and seek imposition of additional regulatory burdens uniquely on such stations, a clearly unconstitutional result. Moreover, their complex suggestions for implementing must-carry rules clearly go beyond any regulations contemplated by Congress in this regard.

SKC stations' impressive record of substantial public service.

The Commission Must Act in this Proceeding Well Before June 2, 1993

SKC respectfully urges the Commission to take prompt action to grant stations with home shopping formats mandatory carriage rights. Under the new must-carry rules, cable systems must begin to carry their full complement of must-carry stations no later than June 2, 1993, and broadcast stations must make their initial must-carry/retransmission consent elections by June 17, 1993.[8/] If the Commission does not act prior to June 2, 1993, home shopping stations will, as a practical matter, be excluded from the pool of qualified local must-carry signals for at least six months, if not longer, because cable systems may not delete or reposition stations during sweeps periods,[9/] and there is a sweep period in July. Moreover, 30 days' notice must precede station deletion or repositioning.[10/] Retransmission consent agreements should be completed by mid-August, which will further finalize channel carriage and

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8/ Report and Order, MM Dockets Nos. 92-259, et al., FCC 93-144 (March 29, 1993); 47 C.F.R. §§76.56(b); 76.64(f).

9/ 47 C.F.R. § 76.58(a), Note.

10/ 47 C.F.R. § 76.58(a). SKC requests that the Commission's decision herein include a blanket waiver of this requirement to permit cable systems to add home shopping stations which elect must-carry status immediately upon receipt of such stations' must-carry elections.

positioning. As a result, the Commission's failure to act by late May will effectively bar home shopping stations' carriage as must-carry signals, rendering a favorable decision a Pyrrhic victory.[11/]

Considerations of fundamental fairness and competitive equity demand a prompt Commission decision in this proceeding. In this instance, a decision delayed would clearly be justice denied.

The SKC Stations Operate in a Manner Fully Consistent with the Public Interest

SKC's Comments included exhaustive documentation clearly establishing its stations' operation in the public interest. This comprehensive showing completely refutes NCTA's unsupported charges that, for example, "...it appears that home shopping stations do not generally provide any of the news, public affairs, or other types of programming 'critical' to an informed electorate..."[12/] and CSC's similar baseless criticism of the quality and quantity of the SKC stations' programming.

As even CSC recognizes, the critical determinant of operation in the public interest is a station's public

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11/ The need for prompt action is exacerbated by the Commission's grant of an extension of time in which to file reply comments herein.

12/ NCTA Comments at 5.

service programming.[13/] SKC's Comments incontrovertibly demonstrated that measured by any reasonable quantitative or qualitative criteria, its stations operate in the public interest to an even greater extent than most independent UHF stations with conventional formats. NCTA's and CSC's groundless criticisms of the amount, scheduling and quality of the SKC stations' public service programming are not only the type of content-based objections which the Commission has consistently rejected as the basis for regulating its

[14/]

Such eligibility is, as NCTA recognizes,[15/] based on Congress' interest in ensuring viewers' access to programming responsive to their problems, needs and interests. The SKC stations air significant amounts of such programming and consequently should have the same Congressionally-mandated rights to cable carriage as other broadcast stations. The SKC Stations do not seek preferred treatment in this regard, only a level competitive playing field.

This is not the Proper Forum to Reargue
The Merits of Television Deregulation

The principal thrust of CSC's Comments is a challenge to Television Deregulation. As set forth in its Summary, for example, CSC asks the Commission to "revisit" deregulation and "act to limit" alleged "overcommercialization." Such relief -- and particularly the predetermined outcome which CSC favors -- is clearly beyond the scope of this proceeding, which is limited to determining whether stations having home shopping formats are capable of complying with their public interest obligations.

CSC seeks to support its position by repeated reference to brief extended remarks added to the debate on

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15/ To the extent that NCTA's comments reflect general disagreement with Congress' decision to impose must-carry requirements, that disagreement is properly expressed in forums other than this rulemaking proceeding.

the 1992 Cable Act. See, e.g., CSC Comments at 10. CSC's suggestion that Section 4(g) mandates de novo review and reversal of Television Deregulation is otherwise unsupported and, more significantly, is contradicted by other legislative history[16/] and is inconsistent with Section 4(g)'s plain language. Congress could have specifically directed the Commission to revisit Television Deregulation's fundamental and judicially-approved[17/] decade-old policy decisions. However, Congress has not so directed the agency and thus the Commission has no authority to do so in this proceeding. CSC's attack on Television Deregulation is not only too late -- the ACT court approved commercial deregulation more than six years ago -- it is outside the scope of this proceeding.

16/ See, e.g., 138 Cong. Rec. S573 (daily ed. Jan. 29, 1992) [Senator Reid recognizes that home shopping stations

In any event, the record contains no evidence that Television Deregulation has failed to achieve its goals. The Commission has explicitly recognized the home shopping format as the type of innovative experimentation which Television Deregulation sought to foster.[18/] The growing popularity of the home shopping format -- the comments herein establish that many stations, not simply the SKC stations, carry home shopping programming -- establishes that the marketplace is, as the Commission had anticipated, acting to provide the viewing public with programming which it desires and is willing to watch.[19/] And the availability and popularity of the home shopping format has had the ancillary benefit of facilitating unprecedented minority ownership of television stations, affording further confirmation of Television Deregulation's wisdom.

CSC urges that there is something inherently undesirable or improper about home shopping programming which requires its removal from the airwaves.[20/] CSC does

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18/ Home Shopping [Network] [sic], Inc., 4 FCC Rcd 2422, 2423 (1989).

19/ See also SKC Comments at n. 22.

20/ Time Warner Entertainment Company, L.P. also suggests that the Commission can limit entitlement to mandatory carriage rights based solely upon the nature of a station's entertainment programming. Comments at 7 - 8. Like CSC, however, Time Warner fails to demonstrate why stations with a home shopping format should be singled out for disparate regulatory treatment.

not explain the policy basis for this view -- nor could it. Why, for example, is home shopping programming more offensive or contrary to the public interest than violent drama shows? Why is it more offensive or contrary to the public interest than sexually-oriented talk shows? If a station devoted all of its entertainment programming to cartoons 24 hours a day, would that be more in keeping with the public interest than home shopping programming? CSC seems to think so: it posits social, artistic and literary merit for all television entertainment programming other than home shopping programming.

CSC apparently believes that stations which carry violent or borderline indecent programming perform more of a public service than home shopping stations. There is no rational basis for such a conclusion -- or for the regulatory burdens CSC seeks to impose uniquely on home shopping stations. CSC's almost paranoid -- and totally unexplained -- dislike of commercial matter[21/] is appropriately expressed in a petition for rulemaking seeking

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21/ At page 4 of its Comments, CSC suggests that the Commission consider spot commercials and well as home shopping programming when determining if a station is predominantly utilized for home shopping programming. Such action would ignore the clear distinction between spot advertising and home shopping programming, a distinction which Congress obviously understands but which CSC apparently cannot grasp. As the SKC Stations all clearly are predominantly utilized for home shopping programming, SKC expresses no further opinion as to the proper definition of "predominant" utilization for purposes of Section 4(g).

readoption of commercial limits, not in a limited determination which denies must-carry rights to stations which operate in full compliance with all established regulatory requirements.[22/]

The issue is not whether the public interest requires reimposition of quantitative limits on the broadcast of commercial matter. Nor do CSC's personal preferences on the merits of different entertainment formats have any relevance to this proceeding. Rather, the narrow inquiry here is whether stations which have chosen a home shopping entertainment format are capable of serving the public interest by the presentation of public service programming so that the rationale underlying mandatory cable carriage requirements applies to their operations. The response to that inquiry is clearly "yes."

Section 4(g)'s Three Considerations Support
Must-Carry Rights for Home Shopping Stations

Contrary to CSC's assertions, the three considerations specified by Section 4(g) confirm home shopping stations' entitlement to mandatory carriage rights.

22/ CSC's implication that only home shopping stations' entertainment programming is driven by the profit motive is naive at best and disingenuous at worst. All commercial broadcast stations seek to make a profit and the fact that some choose to do so by airing 12 to 16 minutes per hour of overtly commercial matter combined with 44 to 48 minutes of violent or sexually-oriented programming does not make their operations any less commercial -- or more entitled to favorable regulatory treatment -- than those of the SKC stations.

Viewing of Home Shopping Stations. CSC recognizes that low viewership does not necessarily reflect public interest operation. CSC Comments at 16. Nonetheless, reflecting its personal animus towards the home shopping format, CSC claims that in the case of home shopping stations, their purportedly low viewership should be considered a disqualifying factor for must-carry eligibility.

Notwithstanding its willingness to contradict itself in order to attack home shopping stations, CSC is correct in asserting that viewership does not measure public interest operation and, as SKC has already demonstrated, does not support denial of must-carry eligibility to home shopping stations. Moreover, even if the Commission allows CSC to have it both ways (i.e., viewership levels have no bearing on public interest operation except with respect to home shopping formatted stations), the facts SKC has submitted establish that its stations do, in fact, enjoy substantial audiences which would be deprived of access to SKC's substantial public service programming if they are denied rights to mandatory cable carriage. The growth and popularity of the home shopping format, reflected by the comments herein, confirms wide viewership of home shopping stations and their need for and entitlement to mandatory carriage rights.

Alternative Uses of Spectrum. CSC also suggests that there are alternate uses for the spectrum now used by home shopping stations which support denial of mandatory carriage rights. CSC's Comments, however, fail to suggest any alternate uses which are specific to the channels used by particular home shopping stations: its reference to the general desires of public safety and emergency service users, for example,[23/] reflect requests for spectrum use on a nationwide basis, not demands which are unique to particular television markets and particular channels. As SKC demonstrated in its Comments, decisions concerning spectrum allocation have always been made -- because it is appropriate to do so -- in rulemaking proceedings of general applicability. Such decisions cannot and should not be made in particular channel-by-channel or market-by-market situations.

Competition. CSC claims that home shopping broadcast stations are indistinguishable from cable home shopping services. SKC's comments demonstrate the error in this argument: the SKC Stations carry a vast amount of non-entertainment public service programming which distinguishes their service from and provides additional competition to

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23/ CSC Comments at 17.

cable home shopping services.[24/] CSC conveniently ignores these facts notwithstanding its knowledge of them. Moreover, HSN's home shopping service is often the only alternative to QVC's cable home shopping service.[25/] Section 4(g)'s third factor thus supports mandatory carriage for home shopping stations.

Home Shopping Stations are Entitled to a Renewal Expectancy Whatever the Decision Here

Section 4(g)(2) directs that stations not be denied a renewal expectancy "solely because their programming consisted entirely of sales presentations or program length commercials." In other words, an adverse outcome here is to have no bearing whatever on a home

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24/ Continental Cablevision, Inc. suggests that according home shopping stations mandatory carriage rights would favor such stations and "could actually decrease competition." Comments at 4. These claims ignore home shopping stations' local public service obligations as broadcast licensees and the regulatory implications of compliance therewith and thus reflect a fundamental ignorance of the differences between a cable network and a local broadcast station. Home shopping stations do not seek a preferred position in seeking mandatory carriage rights: they seek only equal treatment with more conventionally formatted broadcast stations.

25/ To the extent that NCTA urges that according must-carry rights to home shopping stations would impede competition, its quarrel is with mandatory carriage in general, not must-carry for home shopping stations in particular. Mandatory carriage of any broadcast station, regardless of its entertainment format, would have the same impact on consumer preferences and access to limited channel capacity which NCTA claims is associated with carriage of home shopping stations.

shopping station's entitlement to a renewal expectancy[26/] and home shopping stations are to be judged by the same criteria as conventionally-formatted television stations which seek renewal in a comparative context.

CSC, however, would have the Commission impose a higher renewal expectancy standard on home shopping stations. CSC fails to suggest any statutory or precedental basis for such content-based discriminatory treatment and,

[redacted]

therefore entitled to mandatory carriage rights, that conclusion necessarily cannot simultaneously result in loss of entitlement to a renewal expectancy predicated on the same standard applied to conventionally formatted stations.

Congress expressly directed that the decision in this proceeding must at a bare minimum be neutral in terms of its impact on home shopping stations' entitlement to a

Moreover, even if that characterization were accurate, SKC's speech would still be entitled to significant First Amendment protection, requiring a substantial governmental interest in regulating the underlying commercial transactions or incidental harms caused by the speech to be regulated and narrowly tailored means of regulation which "reasonably fit" that interest.

Finally, Professor Smolla clearly demonstrates that judicial approval of Congress' must-carry regulatory scheme depended upon that scheme's content neutrality.[28/] A decision to deny must-carry rights based upon the content of a station's programming would completely undercut the rationale for judicial acceptance of mandatory carriage requirements.

In sum, the First Amendment clearly precludes action in this proceeding which denies must-carry rights based upon the content of a station's entertainment programming.

Conclusion

Supported by an extensive factual record, SKC has demonstrated its stations' clear entitlement to mandatory carriage rights based upon the same standards that are applied to conventionally-formatted television stations.

28/ Turner Broadcasting Systems, Inc. v. United States, Consolidated Nos. 92-2247, 2292, 2494, 2495, 2558, Memorandum and Order (D.D.C., April 8, 1993).

The vast majority of comments filed herein supplemented that evidentiary demonstration and confirmed that there is neither a factual nor a constitutional basis for disparate must-carry eligibility based upon a station's entertainment format. The few comments opposing such eligibility reflect a misunderstanding of the nature and extent of home shopping stations' actual non-entertainment public service programming and an irrelevant personal dislike of their entertainment format. Simply put, the facts submitted in this proceeding, which conclusively demonstrate that home shopping stations serve their local communities with local public interest programming, have irrefutably cut the legs out from under the arguments of home shopping stations' detractors by demonstrating that their arguments are all

and fairness dictate a swift determination. As stated earlier, in this instance, a decision delayed would surely be justice denied.

Respectfully submitted,

SILVER KING COMMUNICATIONS, INC.

By _____
John R. Feore, Jr., Esq.
Suzanne M. Perry, Esq.

DOW, LOHNES & ALBERTSON
1255 - 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

Michael Drayer, Esq.
Vice President, Senior Counsel and
Assistant Secretary
Silver King Communications, Inc.
12425 - 28th Street, North
St. Petersburg, FL 33716

(813) 573-0339

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